IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 13TH DECEMBER 2005 / 22ND AGRAHAYANA 1927

CRL.A.No. 1580 of 2004()

SC.37/1997 of ADDL.SESSIONS COURT, KOZHIKODE

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APPELLANT: PETITIONER

P.S.GIREESH,S/O.SREEDHARAN,
CONVICT NO.5379,
CENTRAL PRISON,
KANNUR.

BY ADV. SMT.VINEETHA PRASANNAN (STATE BRIEF)

RESPONDENTS: RESPONDENT

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.C.P.SAJI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13.12.2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.1580 of 2004

Dated this the 13th December, 2005

JUDGMENT

Appellant is convicted and sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs.1,00,000/- and in default, to undergo rigorous imprisonment for two years under Section 21 of the Narcotic Drugs and Psychotropic Substance Act (`NDPS Act', for short). Set off was also allowed. The said conviction and sentences are challenged in this appeal.

2. According to prosecution, on 29.7.1996 at about 4.45 p.m. the accused was found in possession of 1.900 grams plus 1.250 grams of brown sugar in two packets near the foot path leading to beach side, Varakkal road junction. The appellant was in possession of the drug in violation of the provisions of the NDPS Act and hence he was charge sheeted for offence under Section 21 of the NDPS Act. The crime was detected by PW1, Sub Inspector of Police, who on getting information, proceeded to the spot, along with PW5, Assistant Sub Inspector of Police and others. The arrest and seizure were made in the presence of PW6 and another independent witness.

3. Prosecution examined PWs 1 to 7 and marked Exhibits P1 to P10 and MOs 1 to 4(a) on its side. The accused examined DWs 1 to 4 as defence witnesses and marked Exhibits X1 to X4 on the side of the defence. The court below, relying on the evidences adduced by the prosecution, held that the accused was found in possession of 3.150 grams of

brown sugar in violation of the provisions of the NDPS Act and he was convicted and sentenced under Section 21 of the NDPS Act.

4. To prove the occurrence, prosecution examined PWs 1, 5 and 6. PW1 is the detecting officer who gave evidence that he got information regarding the offence and he immediately went to the scene of occurrence along with PW5 and others. He reached the place and identified the accused with reference to the description received by him. The accused was proceeding towards beach side, after crossing the beach road, on seeing the police jeep. He was stopped and questioned and he was found perplexed. On suspicion, PW1 wanted to conduct a body search and he asked the appellant as to whether he requires presence of a gazetted officer or a Magistrate for the purpose of conducting search, for which he answered in the negative. Therefore, the search was conducted in the presence of witnesses. Two packets of brown sugar having weight of 1.900 grams and 1.250 grams respectively were recovered from the pockets of the shirt worn by the appellant. A seizure mahazar, Exhibit P1, was prepared from the scene and the articles were seized. MOs 1 and 2 are the brown sugar. MO3(a) is the packet containing plastic covers which was used to cover the brown sugar. MO4 is the packet containing the shirt. MO4(a) is the shirt seized at the scene.

5. PW5 corroborated the evidence of PW1 in all material particulars. He also attested to the mahazar, Exhibit P1. PW6 is an independent witness. He also deposed that he found the police party near the Varakkal road-Beach road junction. He saw the police seizing articles

from the accused on 29.7.1996 at about 4.15 p.m. from the road leading to the Varakkal Temple. He also saw the police weighing the article keeping it on the bonnet of the jeep and the article was found to be brown sugar. Four packets seized from there were identified as MOs 1 to 4. He admitted his signature in Exhibit P1 seizure mahazar. He also said that the accused was asked whether he required a gazetted officer for the search and the appellant told that he did not require so and that the article was seized from the appellant's pocket.

6. PWs 1 and 5 are official witnesses, being the Sub Inspector of Police and Assistant Sub Inspector of Police attached to the same Police Station. But a definite case put foward by the accused is that he was taken away by the police from his house stating that the Sub Inspector of Police wanted to meet him. To prove this case PW4, his wife was examined, she deposed that he was taken from the house on 27.7.1996 at about 9 a.m. by five police men and thereafter he was not released. Later she came to know that a case was registered against him. His definite case is that no incident as alleged took place. PWs 1, 5 and 6 were cross-examined at length.

7. PW6 is an independent witness who was not treated as hostile. But in the chief-examination itself he gave inconsistent version. While he deposed that he saw the article being seized from the accused at one point of time, he deposed in another context in the chief-examination itself that he did not see the article being seized. He only knew that it was seized from the possession of the accused. According to him, he only saw the

article being weighed keeping on the bonnet of the jeep. His definite case is that the incident happened on the Varakkal Temple road-Beach road junction, from where the seizure mahazar was prepared. His evidence is inconsistent regarding the search and seizure. It is also to be noted that he had also stated in chief-examination that before the body-search was conducted, the accused was asked whether he required the presence of a gazetted officer etc. No value can be attached to the evidence of PW6 on this aspect because he did not have a case that the seizure was made in his presence.

8. The requirement of Section 50 of the Act will be satisfied by the police official immediately before the search and hence it is evident that PW6 is not speaking the truth before the court. The appellant has a case that PW6 is a witness who speaks at the instance of the police and who have been cited as witness in several cases. He is residing at a distance of 4 k.m. from the scene of occurrence and the evidence given by him shows that he was over-anxious to support the prosecution case and he exaggerated the version, which could be as a result of tutoring, especially with respect to the formalities under Section 50 of the Act.

9. Now coming to the evidence of police officials, it appears that a serious challenge was made during the cross-examination and also by adducing defence evidence to discredit the evidence given by the police officials. Though PWs 1 and 5 have given evidence corroborating each other in all material particulars, it cannot be accepted for face value, unless it is put to strict test especially since the evidence of the independent

witness is shabby and it appears that he is an interested witness.

10. While scrutinising the evidence of PWs 1 and 5, the most striking aspect which appears in this case is regarding the place from where the articles were seized. The police officials who stated that the articles were seized from the pocket of a shirt of the accused and the shirt was also seized and marked as MO4(a). The definite case of the occurrence witnesses is that the seizure was effected from the shirt and that is why MO4 (a) was seized as a material object. Exhibit P1 would also show that the shirt was seized at the spot.

11. However, the accused examined DW3 on his side. He is the Sub Inspector of Police attached to the same Police Station and he gave evidence that entries were made by the Principal Sub Inspector, PW1 in the general diary relating to the date of occurrence. The relevant entry is marked as Exhibit X4. As per the entries in Exhibit X4, the ganja was seen kept in the folds of lunki. In Exhibit X1 it is recorded that brown sugar was kept in the fold of the lunki of the accused. Exhibit X4 entry in the general register was recorded immediately on reaching the Police Station, after the seizure on 29.7.1996 at 6.30 p.m. Exhibit X4 is a contemporaneous document, which goes totally against the case set up by the prosecution that seizure was effected from the pocket of the shirt which was allegedly seized at the scene. None of the witnesses has a case that lunki was seized, though the G.D entry shows that the article was seized from the fold of lunki.

12. In this regard, the omissions in Exhibit P1 seizure mahazar assumes importance. None of the details regarding the manner in which the seizure was made and the compliance of Section 50 of the NDPS Act etc., which are vital in nature, are recorded in Exhibit P1. There is no explanation for such omission. That apart, in Exhibit P2 report, which is claimed to have been prepared at the same time at 6.30 p.m., a different picture is revealed. It is stated that the article was seized from the pocket of the accused. There is no case that it was seized from the fold of the lunki. The accused was successful in establishing that the entries in the G.D is contradictory to the evidence given in court and other documents which are prepared on the same date and time.

13. The defence plea that this incident did not occur as alleged by the prosecution, cannot be rejected. The court below has not paid much attention to this aspect. The court below rejected this discrepancy by explaining that the accused did not prove the entry in Exhibit X4 through the person who prepared the same and no opportunity was given to such officer to explain the discrepancy. This approach is not proper. The official witness, DW1 is a Sub Inspector of Police who marked Exhibit X4 and he deposed before the court that Exhibit X4 was prepared by PW1, detecting officer. When the discrepancy was brought out in defence, it is the duty of the prosecution to explain it and prove its case beyond reasonable doubt. The document has not come from the custody of the accused. The document is an official document which is kept in the Police Station which contains day to day entries. When the entries are directly contrary to the

prosecution case, it is the duty of the prosecution to explain the same. In the absence of it, the benefit must go to the accused.

14. In this context, another relevant document is also marked by the defence. Exhibit X2(a) is the entry relating to the accused regarding the property found from the person of the accused. Exhibit X2(a)maintained at the Police Station and it was marked through DW1, the official witness. As per the entries, property found on the person of the accused were shirt and lunki, as per column No.6. Column No.7 shows that only the lunki was given for wearing and according to prosecution, the shirt was seized as MO4(a). The prosecution case is that after the arrest and making the entries in Exhibit X2(a), the accused was produced in court, as escorted by armed police constable.

15. But Exhibit X3 register maintained in the jail which is proved through the First Grade Assistant Jailor in the District Jail shows that Rs.30/was seized from the possession of the accused when he was produced in the jail. The accused was produced in the jail on 30.7.1996 as a remand prisoner. Entries made in the cash register, Exhibit X3 shows that Rs.30/- was seized from the prisoner who was brought from the court through armed escort. Though the case of the prosecution is that only the shirt and lunki were seized, it is not explained how this money has come to the possession of the accused, though he was throughout in the custody of the police till he was produced in jail. This also cast a doubt on the veracity of the prosecution case that a seizure was effected as alleged.

16. In this regard the evidence of DW1 is to be looked into. He

deposed that he is working as A.S.I. in the same Police Station and his case in the chief examination itself is that when the accused was produced in the station, he was wearing a shirt and lunki as seen from column No.6 in the register. But, according to the official witnesses examined to prove arrest , search and seizure, the shirt was seized at the spot. The prosecution has to explain this discrepancy also. But it was not done. The evidence of DW1 is inconsistent of the version given by the prosecution witnesses regarding the seizure of MO4(a) shirt at the scene of occurrence under Exhibit P1 mahazar. In the light of the evidence given by DW1 in the chief examination itself, this discrepancy also ought to have been explained by the prosecution.

17. But the court below has taken a strange view in this regard also. Referring to the discrepancy in Exhibit X2, it was observed that a reading of the register will go to show that it was intended for the purpose of mentioning the personal articles seized from the possession of the accused at the time of his arrest and not at the time when he was produced in the station. This finding is totally against the evidence given by DW1 in the box. When the police official gives evidence that those were the dresses worn at the time of production in the Police Station, the court cannot act upon presumptions that the entries may be with respect to the articles which were in the possession of the accused at the time of arrest, unless such explanation is brought out by the prosecution. The court cannot act prejudicial to the prosecution by explaining away each and every discrepancy even by going against the version given by the police official in

the box.

18. More care should have been taken by the court below to assess the evidence, giving due weight to the discrepancies without any prejudice against the accused. In the light of the discrepancies discussed above, I find that the evidence of PWs 1 and 5 cannot be acted upon to prove prosecution case. The burden is on the prosecution to prove that the accused was in possession of brown sugar as alleged by the prosecution, but such burden is not discharged. In the above circumstances, conviction and sentence passed against the appellant are unsustainable.

In the result, conviction and sentence passed against the appellant under Section 21 of the Narcotic Drugs and Psychotropic Substance Act are set aside. The appellant is found not guilty of offence under Section 21 of the Act and he is acquitted of the said offence. He is set at liberty forthwith. The Registry shall issue release memo to the concerned jail authority forthwith.

K.HEMA, JUDGE

vgs.

K.HEMA,J.

CRL.A.NO.1580 OF 2004

JUDGMENT

13.12.2005